Supreme Court, U.S.
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No. 96-566

In The

Supreme Court of the United States

October Term, 1996

SHARI WEBBER,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

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16 pp

I.
QUESTIONS PRESENTED

I. Whether this Court should review a decision of the Kansas Supreme Court, which found the aggravating circumstances of K.S.A. 21-4625(4) that the "defendant authorized or employed another person to commit the crime" was not unconstitutionally vague?

II. Whether this Court should review a decision of the Kansas Supreme Court that, consistent with prior case law, found that evidence of the taking of a polygraph test is inadmissable?

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TO THE HONORABLE SUPREME COURT:

The Respondent, State of Kansas, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Shari Webber.

STATUTES INVOLVED IN THIS CASE

K.S.A. § 21-4625 provides:

Aggravating circumstances shall be limited to the following:

(1) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.

(2) The defendant knowingly or purposely killed or created a great risk of death to more than one person.

(3) The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(4) The defendant authorized or employed another person to commit the crime.

(5) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(6) The defendant committed the crime in an especially heinous, atrocious or cruel manner.

(7) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

(8) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.

STATEMENT OF THE CASE

Petitioner was convicted in Stevens County District Court of one count of First Degree Murder, K.S.A. 21-3401, and one count of Conspiracy to Commit First Degree Murder, K.S.A. 21-3302; 21-3401. The convictions were handed down after a jury trial concerning the March 26, 1994, murder of the Petitioner's husband, David Scott Webber, by the Petitioner's lover, Victor Bansemer. The Petitioner was ordered to serve a Hard 40 sentence, after the jury determined that the Petitioner was guilty of the aggravated circumstance found in K.S.A. 21-4625(4), that the defendant authorized or employed another person to commit the murder. The Petitioner appealed directly to the Kansas Supreme Court and the convictions were affirmed by an Opinion filed June 7, 1996. Petitioner filed a motion for rehearing, which was denied on July 11, 1996.

The Petitioner repeatedly argued before the trial court that K.S.A. 21-4625(4) was an unconstitutionally vague statute. The trial court ruled that K.S.A. 21-4625(4) was not unconstitutionally vague. The jury, after presentation of evidence by the Respondent of aggravating

circumstances and the presentation of mitigating circumstances by the Petitioner, found that sufficient aggravating circumstances, pursuant to K.S.A. 21-4625(4) existed and recommended a Hard 40 sentence. The Petitioner argued before the Kansas Supreme Court that the trial court's ruling that K.S.A. 21-4625(4) was not unconstitutionally vague was improper. The Court affirmed the trial court's ruling and found that K.S.A. 21-4625(4) is not unconstitutionally vague. (Pet. App. A, A-40-41).

Respondent, during trial, filed a Motion in Limine and asked the trial court to order that the Petitioner not be allowed to present any evidence concerning the taking of a polygraph test. Respondent indicated in arguments in support of its Motion in Limine that the Respondent had filed a Motion for Production and had received no information concerning the polygraph test allegedly taken by the Petitioner. (App. A, A-1). Petitioner then attempted to proffer evidence that she had voluntarily taken a polygraph test at the request of the State. (App. A, A-1, 2). Petitioner failed to indicate that the polygraph examination the Petitioner allegedly completed was not completed as requested by law enforcement. The Petitioner's polygraph examination was completed without the knowledge of the State and was not completed in the presence of any investigating officers or completed by an approved examiner. The trial court then properly held that the evidence concerning the taking of the polygraph test or any results thereof, were inadmissible as evidence in the case. (App. A, A-3). The trial court's ruling to exclude the evidence of a polygraph examination was affirmed by the Kansas Supreme Court. (Pet. App. A, A-21).

SUMMARY OF THE ARGUMENT

The Kansas Supreme Court correctly decided that K.S.A. 21-4625(4) is not unconstitutionally vague and passes the test for determination of constitutional vagueness. The Petitioner has raised no legal basis for this court to grant review of this issue.

The Kansas Supreme Court properly affirmed the decision of the trial court that any evidence concerning the taking of a polygraph test is inadmissable. The Petitioner has not stated sufficient grounds to indicate why this court should review the question of the admissibility of polygraph testing. Petitioner has failed to show how the proper ruling that the taking of a polygraph test is inadmissable resulted in the denial of the Petitioner's constitutional right to due process. The Kansas Supreme Court properly determined that the Petitioner was not denied her constitutional rights in the trial of her husband's murder.

REASON FOR DENYING THE WRIT

I. The Kansas Supreme Court held that K.S.A. 21-4625(4) is not unconstitutionally vague. The decision was based on prior case law and did not raise any question of constitutional law.

The Petitioner, in her brief, alleges that the Kansas Supreme Court in its holding in this case, has added an additional definition to the terms "authorized or employed" when the court made its finding that the Petitioner, "used another as an instrument" to commit the

crime. The Petitioner has taken the court's statement out of context. When the Kansas Supreme Court made the ruling it was answering the question "[w]as there sufficient evidence to support a finding beyond a reasonable doubt, that one or more of the aggravating circumstances in K.S.A. 21-4625 outweighed any mitigating circumstances?" (Pet. App. A, A-41). The Court was not attempting to define the terms "authorize or employ" but was in fact determining "whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor in whether the evidence supports the findings that the aggravating circumstances existed and that any mitigating circumstances were insufficient to outweigh the aggravating circumstances." *State v. Gideon*, 257 Kan. 591, Syl. 16, 894 P.2d 850 (1995). (Pet. App. A, A-41). Therefore, the statement alleged by the Petitioner to be that of an additional definition for authorized or employed was simply in the prose of Justice Larson in which he stated that, "[e]vidence presented at trial was clearly sufficient to establish that Shari [Petitioner] cultivated a relationship with Bansemer to use him as an instrument to kill her husband. The aggravating factor was sufficiently supported, and a rational jury could find that it outweighed any countervailing mitigating circumstances. There is no evidence the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor." (Pet. App. A, A-42). The Court clearly was not addressing the question of the constitutionality of K.S.A. 21-4625(4) at this point in its opinion.

The Petitioner goes on to argue that to determine whether or not K.S.A. 21-4625(4) is unconstitutionally vague requires a two-pronged approach. The Kansas

Supreme Court addressed that argument in its finding that, pursuant to *State v. Bailey*, 251 Kan. 156, 172-73, 834 P.2d 342 (1992), "[w]hen considering penalty provisions, we have explicitly rejected the rigorous approach to vagueness applied to statutes defining violations of the law." (Pet. App. A, A-40). The court also properly found that "[b]ecause criminal conduct is a prerequisite to the application of sentencing statutes, the risk of infringing on constitutionally protected conduct is not involved; in addition, discretion is inherent in the sentencing process." (Pet. App. A, A-40). Clearly, the Petitioner has attempted to apply an improper test to determine whether K.S.A. 21-4625(4) is unconstitutionally vague. The test the Petitioner asks the Court to use does not apply to a sentencing statute, only to a statute defining a violation of the law.

The Petitioner attempts to indicate that because the term authorized has lengthy definitions, the term is somehow vague. In fact, the terms "authorized" or "employed" are commonly used words, easily understood by a jury applying them. Black's Law Dictionary defines "employed" as follows: "this signifies both the act of doing a thing and the being under contract or orders to do it." At the trial of the Petitioner, evidence was presented to the jury that the Petitioner repeatedly *ordered* her lover, Victor Bansemer, to kill her estranged husband, David Scott Webber. The Kansas Supreme Court properly determined that the terms "authorized" or "employed" are commonly used words that do not require additional definition and therefore, do not raise an issue of constitutional vagueness.

II. The Supreme Court of Kansas made a proper ruling when it affirmed the trial court's exclusion of evidence concerning a polygraph examination. This issue was properly analyzed and was based on well settled case law indicating that evidence of a polygraph examination is so highly prejudicial that it cannot be allowed into evidence.

In *State v. Wise*, 237 Kan. 117, 123-24, 697 P.2d 1295 (1995), the Kansas Supreme Court handed down the ruling that "[t]o permit the defendant to introduce the results of the test, or even to refer to the giving of the test, would have been improper". In *Wise*, the defendant attempted to introduce evidence of the results of a polygraph test and the trial court determined that the defendant could not enter the results or refer to the polygraph test to the jury. In this case, the Petitioner contends that the fact she allegedly voluntarily submitted herself to a polygraph test should be allowed into evidence if no mention is made of the results. Clearly, this is in direct contradiction with Kansas law.

The Petitioner alleges that the taking of the polygraph test was sanctioned by the State, when in fact, the Petitioner refused to submit herself to polygraph examination by a State authorized examiner. The examination the defendant claims to have taken was done by an individual not known to the State and was done without the participation of the State in the examination. In addition, the State had requested the submission from the Petitioner of those test results prior to trial and was never given the results of the polygraph examination allegedly completed by her.

The Petitioner's argument that "if incriminating statements made by an accused during the course of a polygraph examination are admissible when they are voluntarily made, exculpatory statements made by an accused during the course of a polygraph examination should also logically be admissible" (Pet. petition for Writ of Cert., Pg. 6-7), has no logical application in this matter. The Petitioner fails to recognize that in cases where incriminating statements given voluntarily during a polygraph examination are found to be admissible, the voluntary statement is presented as an incriminating statement made to another individual, not as evidence that a polygraph test was taken. The only way for the Petitioner to have entered into evidence that she voluntarily took a polygraph test would be for her to present evidence concerning the conversations and the questions asked during the polygraph examination. Once the issue is raised of the Petitioner taking a polygraph examination there is no way to avoid the jury drawing the conclusion that the law recognizes a polygraph to be reliable and competent and that clearly the Petitioner would not have commented on the polygraph examination if the results had not reflected favorably for her. The result would be to allow into evidence the assumption that polygraph tests are reliable and accurate which is contrary to case law from nearly every jurisdiction.

The Kansas Supreme Court's decision affirming the trial court's exclusion of the evidence that the Petitioner took a polygraph test was proper and no arguments have been raised by the Petitioner to indicate that she was unconstitutionally denied her right to due process and to a fair and impartial trial.

CONCLUSION

Accordingly, for all the foregoing reasons, the Petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

EXCERPT OF TRIAL TRANSCRIPT

* * *

[p. 32] Miller. The state has filed a motion in limine. Mr. Concannon?

MR. CONCANNON: Yes, it was two-fold, Your Honor. First, there has been reference made by the defense to a polygraph. I have filed early on in this case a motion for production and received no information pertinent to that polygraph, certainly no test results, nor have I been advised of testimony of any experts. Usually it is the state that attempts to introduce polygraph. And clearly under the case law, the refusal to take, or acceptance, or results – or the taking or results of that polygraph are inadmissible. And I'd offer as authority *State v. Lee,* L-e-e. We ask that any reference, whatsoever, at any stage of the proceedings to the taking of a polygraph by the defendant be excluded. The only possible inference that could be made from that would be that the defendant passed it. And we think that's prejudicial to the jury. I think it's improper, improper use of evidence that is otherwise inadmissible.

MR. MILLER: Your Honor, on the issue of the polygraph, which is Paragraph A in the motion filed by the state, the defendant was requested early on in this investigation to take a polygraph. She took a polygraph examination. We agree that – And that was at [p. 33] the request of the state. We agree that absent a stipulation between the parties, the results of a polygraph examination are not admissible.

However, the taking of a polygraph examination or the refusal to take one is admissible affecting – similar to the flight evidence that we discussed Friday – as to knowledge of guilt. The fact that one would voluntarily take a polygraph examination or refuse to take a polygraph examination, I believe, is admissible. And we've not sought to introduce the results of the polygraph examination through an expert saying that polygraph examination was passed or failed.

MR. CONCANNON: Your Honor, that's smoke and mirrors. The only way that this – The only way we can get into the polygraph issue is to discuss before the jury all of the circumstances surrounding this purported taking of the polygraph.

COURT: Well, let's end it here, Counsel, let's end it here. I heard last Friday when we were arguing a motion on the fact on flight, that the defendant had taken a polygraph and had, quote, passed the polygraph. And I think that reference was proper in that framework, but it's certainly not proper in front of a jury. The taking of a polygraph is – A polygraph – Polygraph examinations are not admissible into [p. 34] evidence. And according to this *State v. Lee*, 197 Kan. 463, the results are certainly – we all know the results are not admissible. And I think even the defendant is saying that. But in *Lee* they're quoting *State v. Lowry* of 163 Kan. 622, and they're quoting, also, *State v. Smith*. And it says the results of a lie detector test was not admissible as evidence under the decisions of this court. And any reference thereto on the part of the state or its witnesses would have constituted error.

Nevertheless, I understand in this case there's a benefit to the defendant. But if the state could not put in any part thereof, then certainly the defendant can't.

Now, gentlemen, we're not going to talk about polygraph. The motion's granted. I'm going to prohibit either party from disclosing to the jury that she took a polygraph examination, or that she passed it. I think that's very, very clear law in Kansas.

MR. DIEPENBROCK: What about the issue of agreement or nonagreement?

COURT: There's no agreements, are there?

MR. CONCANNON: No, there was no agreement.

COURT: We're talking about something

* * *